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No. 418

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CLERK

In the Supreme Court of the United States

A. B. HALE, as Chairman and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and constituting the STATE ROAD DEPARTMENT OF THE STATE OF FLORIDA, *Appellants,*

vs.

BIMCO TRADING, INC., a corporation, and BROWARD COUNTY PORT AUTHORITY, a public corporation, *Appellees.*

Appeal from
The United States District Court for the Northern District of Florida

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BRIEF FOR APPELLANTS OPPOSING THE STATEMENT OF APPELLEES MAKING AGAINST THE JURISDICTION OF THE COURT AND THEIR MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and constituting the STATE ROAD DEPARTMENT OF THE STATE OF FLORIDA, *Appellants,*

vs.

BIMCO TRADING, INC., a corporation, and BROWARD COUNTY PORT AUTHORITY, a public corporation, *Appellees.*

BRIEF FOR APPELLANTS OPPOSING THE STATEMENT OF APPELLEES MAKING AGAINST THE JURIDICTION OF THE COURT AND THEIR MOTION TO DISMISS OR AFFIRM

The defendants in the court below are here the appellants, and the plaintiffs are the appellees, and will be so referred to.

On September 6, 1938, the appellants applied by Petition to the United States District Court for the Northern District of Florida, for an Order allowing an appeal from the Final Decree rendered, on the 14th day of June, 1938, by a three-judge court convoked under Section 266 of the Judicial Code, being Section 380, Title 28, U. S. C. A., in that cause then pending in said court, wherein the appellees here were plaintiffs, and the appellants were defendants,

the Petition for allowance of appeal appears at page 78 of the typewritten transcript of the record.

On September 6, 1938, an Order was entered by the Judge of the United States District Court for the Northern District of Florida, allowing an appeal from the Said Final Decree of June 14, 1938, which Order appears at page 86 of the typewritten transcript of the record.

With the Petition for the allowance of an appeal, appellants filed their Jurisdictional Statement, in compliance with Rule 12 of the revised Rules of the Supreme Court of the United States, which Statement appears at page 81 of the typewritten transcrip of the record.

On September 21, 1938, appellants were served with a copy of a paper filed in this cause by appellees, designated as "Statement making against Jurisdiction and Motion to Dismiss or Affirm", purporting to be filed in accordance with the provisions of Paragraph 3, Rule 12, of said Rules of the Supreme Court of the United States.

The said Jurisdictional Statement shows:

(a) That the Final Decree appealed from was rendered by a three-judge court convoked under Section 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.), in which the appellants, as State officers, were enjoined and restrained from enforcing, or attemptiug to enforce, the provisions of a State statute of Florida. By Section 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.) it is provided that "the requirements respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a Final Decree granting or denying a permanent injunction in such suit."

(b) The statute, the validity of which is involved in the Final Decree appealed from, was enacted by the

Legislature of Florida, at its regular session in 1937, but was not printed in the bound volume of the Acts of the Legislature of 1937, but is on file in the office of the Secretary of State of the State of Florida and was, by the Supreme Court of Florida, held and adjudged to have been properly passed, and that it became effective as a law of the State, in the case of STATE, ex rel. *FLORIDA PORTLAND CEMENT COMPANY v. HALE, ET AL.*, 129 Fla. 588, 176 So. 577, and is set out in full in the opinion of the Court in said case, and is also set out verbatim in said Jurisdictional Statement.

(c) Said Jurisdictional Statement gives the date of the Final Decree sought to be reviewed by the appeal, and the date upon which the application for appeal was presented to the District Court.

(d) Said Jurisdictional Statement contains a concise statement of the history and nature of the case, and shows that the rulings of the court below were such as to bring the case within the provisions of Section 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.), and includes a statement of the points or grounds upon which appellants contend the questions are substantial, and decisions of this Court are cited, which are believed by appellants to sustain the jurisdiction of the Court under Sec. 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.)

(e) The appellants did not append to the Jurisdictional Statement a copy of any opinion delivered by the court below upon the rendering of the Final Decree sought to be reviewed, nor any earlier opinions in the same case, because none were rendered, and this is pointed out in said Jurisdictional Statement.

Obviously, therefore, the Jurisdictional Statement complies fully, and in every respect, with the requirements of Rule 12 of the revised Rules of this Court, and it is contended, on behalf of appellants, that the questions involved,

as set out in said Jurisdictional Statement, are substantial, and that it clearly appears that this Court has jurisdiction of the appeal.

The so-called statement of appellees making against jurisdiction does not disclose any matter or ground making against the jurisdiction of this Court, claimed by the appellants in their Jurisdictional Statement. It consists merely of a statement of the history of this case and a purported statement of the history of the mandamus case of STATE, ex rel. *FLORIDA PORTLAND CEMENT COMPANY v. A. B. HALE, ET AL.*, 129 Fla. 588, 176 So. 577, pending in the Supreme Court of Florida at the time of the institution of this suit and of the granting of the Interlocutory Injunction, in which was involved the same statute as is involved in this case. Instead of the said statement disclosing matters or grounds making against the jurisdiction of this Court, as claimed in appellants' Jurisdictional Statement, the history of the case, contained in said statement, rather makes for the jurisdiction of this Court, by showing that the case should be heard on its merits, rather than on a motion to dismiss or affairm. In making the purported statement of the history of the mandamus case of STATE, ex rel. *FLORIDA PORTLAND CEMENT COMPANY, v. A. B. HALE, ET AL.*, supra, appellees, in their so-called statement making against the jurisdiction of this Court, have gone outside the record in this case, to state that on the 19th day of November, A. D. 1937, the Supreme Court of Florida issued a Peremptory Writ of Mandamus in said case. The making of that statement was an attempt to make it appear that the said mandamus action had terminated and was not pending in the Supreme Court of Florida on the 26th day of November, 1937, when the three-judge court granted an Interlocutory Injunction in this cause. It is true, as a matter of record in the files of the Supreme

Court of Florida, that a Peremptory Writ of Mandamus was issued against these appellants on the 19th day of November, 1937, but that fact does not appear in this record. The appellees, however, did not go out of this record to disclose to this Court the fact that the Supreme Court of Florida, on the 9th day of December, 1937, upon the motion of attorneys for these appellants, who were defendants in the mandamus action in the Supreme Court of Florida, made and entered its Order Staying Further Proceedings in said mandamus action, because of the conflict between the command of the Peremptory Writ of Mandamus issued by the Supreme Court of Florida, on the 19th day of November, 1937, commanding these appellants, as and constituting the State Road Department of Florida, to enforce the provisions of the Act here involved, on the one hand, and the Interlocutory Injunction of the Federal three-judge court, entered on the 26th day of November, 1937, enjoining and restraining these appellants, as and constituting the State Road Department of Florida, from enforcing the provisions of the said Act here involved, on the other hand. An attested copy of the said Stay Order of the Supreme Court of Florida, dated December 9, A. D. 1937, in the said mandamus action, is attached hereto as Exhibit "A", for the information of the Court. While we admit the entry of the Peremptory Writ by the Supreme Court of Florida, in the mandamus action, on November 19, 1937, we think it but fair that this Court be informed as to the further action of the Supreme Court of Florida, at a date subsequent to the entry of the Interlocutory Injunction by the Federal three-judge court, in order that this Court may determine whether the mandamus action was pending in the Supreme Court of Florida, and undisposed of, at the time of the institution of this suit, and on the date of the entry of the Interlocutory Injunction. The Stay Order stands unrevoked at this date, and it is our contention that

the mandamus action is still pending and undisposed of. Obviously, these appellants could not obey both the Peremptory Writ of Mandamus, commanding them to enforce the provisions of the Act here involved, and the Interlocutory Injunction or Final Decree, enjoining them from enforcing the provisions of said Act, and it was for the purpose of relieving them of the contradiction of those judgments, that their counsel applied for and obtained a stay of the proceedings in the mandamus case until the appeal in this case could be determined. It needs no argument to demonstrate that if the mandamus action had not been pending in the Supreme Court of Florida on the 9th day of December, 1937, that court would have had no jurisdiction to have entered the Stay Order.

If the Interlocutory Injunction or the Final Decree of the Federal three-judge court appealed from had the effect of staying the proceedings in the mandamus case then pending in th Supreme Court of Florida, then the granting of said Interlocutory Injunction and the entry of the Final Decree appealed from, were in violation of Sec. 265 of the Judicial Code (Sec. 379, Title 28, U. S. C. A.), and that presents a substantial question to be passed upon by this Court, on this appeal. We think no argument is required to demonstrate that the injunctive orders of the Federal three-judge court did have the effect of staying the proceedings in the mandamus action then pending in the Supreme Court of Florida, because the provisions of the Interlocutory Injunction and of the Final Decree are in direct conflict with the commands of the Peremptory Writ of Mandamus issued by the Supreme Court of Florida on November 19, 1937. The appellants here were defendants in both cases, wherein the identical statute was involved; and counsel for and on behalf of, and at the instance and request of, Broward County Port Authority, one of the ap-

pellees here, filed a Petition to Intervene in said Mandamus proceedings, and also filed a Petition for Rehearing therein. (See Petition at p. 35, and Certificate of the Clerk of the Supreme Court of Florida at p. 40, of the typewritten transcript of the record herein).

Under paragraph (b) of appellees' statement the contention is made that the enforcement of the act here involved would violate certain treaties and trade agreements entered into between the United States and certain foreign countries. There is no allegation in the Bill of Complaint to the effect that the enforcement of said Act would violate any treaty or trade agreement entered into between the United States and any foreign country, and this question was, for the first time, attempted to be injected in this case by the introduction of an ex parte affidavit at the hearing before the Federal three-judge court, on the application of appellees for an Interlocutory Injunction. The issues involvd in this case are clearly defined and limited by the allegations of the Bill of Complaint, as set forth in paragraph 18 thereof, wherein it is alleged that the said Act is unconstitutional and void, and in violation of the Constitution of the United States, in the respects therein designated, none of which relate to the question sought to be raised here by paragraph (b) of said statement. If the question here sought to be raised were an issue in this case, such question would relate to the merits of the case, rather than to the jurisdiction of the Court.

The only other contention made in appellees' statement is that found in paragraph (c), where it is said that the only real questions involved in this appeal have been previously decided by this Court. As a matter of fact, none of the cases cited by appellees go to the question of jurisdiction. In the first three cases cited the Court had under

consideration statutes which were held to be unconstitutional because they discriminated between the States and imposed burdens on interstate commerce not permitted by the Constitution of the United States. These cases have no bearing upon the questions involved in this appeal, for the reason that the statute now before the Court deals with a classification made by the Constitution itself. The other three cases cited by appellees in their said statement involve the question of the effect of the failure of the District Court to observe the requirements of Rule 70½ of the Rules of this Court in granting Interlocutory Injunctions and, certainly, cannot affect the jurisdiction of this Court to hear the appeal.

We respectfully direct the Court's attention to the cases cited in appellants' Jurisdictional Statement, where this Court, in passing upon the jurisdiction of this Court to hear direct appeals in cases such as is involved in this appeal, has consistently stated the rule to be:

> "The application for the preliminary injunction having been pressed to a determination before the court of three judges, the case is properly here on direct appeal from the final decree of that court."

We respectfully submit to the Court that the questions involved in this appeal are substantial, and that this Court has jurisdiction under the law and rules applicable thereto.

In conclusion, we would direct the Court's attention to the following cases:

> STATE OF FLORIDA, ex rel. *FLORIDA PORTLAND CEMENT COMPANY v. A. B. HALE, ET AL.*, as and constituting the STATE ROAD DEPARTMENT OF FLORIDA,
> 129 Fla. 588, 176 So. 577;

NEILSON v. GARZA,
17 F. Cases 1302, Case No. 10,091, (2 Woods 287);
BROWN, ET AL. v. MARYLAND,
12 Wheat. text 436; 6 L. Ed. 685;
PATAPSCO GUANO COMPANY v. BOARD OF AGRICULTURE,
171 U. S. 345, 18 S. Ct. 862, 43 L. Ed. 193;
NEW MEXICO, ex rel. *McLEAN v. DENVER & P.G.R. COMPANY,*
203 U. S. 38, 27 S. Ct. 1, 51 L. Ed. 85;
RED "C" OIL MANUFACTURING COMPANY v. BOARD OF AGRICULTURE,
222 U. S. 380, 32 S. Ct. 152, 56 L. Ed. 240;

which support appellants' contention, in this appeal, as to the validity of the statute involved herein, and clearly demonstrate that the questions involved in this appeal are substantial, and the Motion to Dismiss or Affirm, filed by appellees, should be denied.

Respectfully submitted,

GEORGE COUPER GIBBS,
Attorney General of Florida.

H. E. CARTER,
Assistant Attorney General
Attorneys for Appellants.

PAT WHITAKER

TOM WHITAKER
Of Counsel.

IN THE SUPREME COURT OF FLORIDA,
JUNE TERM A. D. 1937,
Thursday, December 9, A.D. 1937

STATE OF FLORIDA, ex rel FLORIDA PORTLAND CEMENT COMPANY, a corporation,
Relator,
-vs-
A. B. HALE, as Chairman and E. A. McCLOSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and constituting the State Road Department of the State of Florida,
Respondents.

ORIGINAL JURISDICTION
MANDAMUS

This cause having been submitted to the Court upon the motion of the Attorneys for the State Road Department for a Stay Order pending the appeal of the subject matter herein involved, to the United States Supreme Court in which its motion has been duly considered, it is thereupon ordered and adjudged by the Court that the said motion be granted and that all further proceedings and actions taken pursuant to the peremptory writ of Mandamus heretofore issued in this cause, be and the same is hereby stayed until the final decision of the Supreme Court of the United States upon the constitutionality of the act involved in this cause and until the further order of this Court.

A true copy,
TEST:
(s) G. T. WHITFIELD,
Clerk Supreme Court of Florida.

(Seal, Supreme Court of the State of Florida)

EXHIBIT "A"